

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 FERNANDO HERNANDEZ, KENNETH CHOW,
5 BRYANT WHITE, DAVID WILLIAMS, MARQUIS ACKLIN,
6 CECILIA JACKSON, TERESA JACKSON,
7 MICHAEL LATTIMORE, and JUANY GUZMAN, Each
8 Individually, And On Behalf Of All Other
9 Persons Similarly Situated,

Plaintiffs,

-against-

Index No:

12 CV 4339 (ALC) (JLC)

10 THE FRESH DIET, INC., LATE NIGHT EXPRESS
11 COURIER SERVICES, INC. (FL), FRESH DIET EXPRESS
12 CORP. (NY), THE FRESH DIET - NY INC. (NY),
13 FRESH DIET GRAB & GO, INC. (FL) a/k/a
14 YS CATERING HOLDINGS, INC. (FL) d/b/a
15 YS CATERING, INC. (FL), FRESH DIET EXPRESS
16 CORP. (FL), SYED HUSSAIN, Individually,
17 JUDAH SCHLOSS, Individually, and ZAIMI DUCHMAN,
18 Individually,

Defendants.

-----x

19 EXAMINATION BEFORE TRIAL of
20 the Plaintiff, KENNETH CHOW, taken by the
21 Defendant, pursuant to Notice, held at the
22 offices of Kaufman, Dolowich, Voluck & Gonzo
23 LLP, 100 William Street, Suite 215, New York,
24 New York 10038, on September 24, 2013, at
25 9:46 a.m., before a Notary Public of the State
of New York.

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A P P E A R A N C E S:

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BY: YALE POLLACK, ESQ.

FILE #: 055611-0002

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S T I P U L A T I O N S

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties herein, that filing, sealing and certification, and the same are, hereby waived.

IT IS FURTHER STIPULATED AND AGREED that all objections except as to the form of the question, shall be reserved to the time of the trial.

IT IS FURTHER STIPULATED AND AGREED that the within deposition may be signed and sworn to by an officer authorized to administer an oath, with the same force and effect as if signed and sworn to before the Court.

1 K. Chow

2 Service?

3 A. Yes. I voluntarily resigned.

4 Q. What'd you do after that?

5 A. After that, I was like searching for
6 small business opportunities.

7 Q. Did you find any?

8 A. I found three, but three weren't
9 successful as I thought I was expecting.

10 Q. What'd you do for work between the time
11 you resigned from the Postal Service and
12 started working with The Fresh Diet?

13 MR. ANDREWS: Objection.

14 A. At the beginning, I first found a cruise
15 agency, like a franchise.

16 Q. What'd you do for the cruise agency?

17 A. Like a franchisee selling cruises.

18 Q. When did you do that?

19 A. That should be around like March of 2006
20 until they terminate contract is around May of
21 2009.

22 Q. What other opportunities were you
23 involved with?

24 A. Cell phone -- phone line, cell phone
25 business.

1 K. Chow

2 Q. When was that?

3 A. That's around the same time.

4 Q. You were working both jobs at the same
5 time?

6 MR. ANDREWS: Objection.

7 A. Yeah, I was operating those business at
8 the same time.

9 Q. Were you owners of those businesses?

10 A. Yes.

11 Q. Did you have any partners?

12 A. No, just myself.

13 Q. What were the names of the businesses?

14 What was the name of the cruise agency?

15 A. Cruise Planners.

16 Q. What about the cell phone?

17 A. Cell phone is just get my own website.
18 It's freecellies.com.

19 Q. Free what?

20 A. Cellies, C-E-L-L-I-E-S,.com.

21 Q. I think you mentioned maybe a third
22 business opportunity; is that correct?

23 A. Yeah. It's like a towel business.

24 MR. ANDREWS: Towel?

25 THE WITNESS: Yes.

1 K. Chow

2 Q. When did you work in the towel business?

3 A. It's about the same time too.

4 Q. Were you performing all three jobs
5 between March 2006 and May 2009?

6 MR. ANDREWS: Objection.

7 A. Except for those two. Those two I
8 didn't make no money. I just like let it go as
9 of -- as I didn't make no money, I said limited
10 income, and I decide to call off.

11 MR. ANDREWS: He's asking you
12 about the dates, if you can recall the
13 dates.

14 A. Oh, the cell phone business, I would
15 say -- I call it off on the business at around,
16 let's say, 2007.

17 Q. When you said "those two," which two
18 were you referring to?

19 A. The towel -- I was talking about the
20 cell phone business. The towel, I didn't make
21 no money, so I call off on the same year.

22 Q. What was the name of the towel business?

23 A. Towel business? I don't recall the
24 website. I have the -- they gave me a website
25 for my own website. I don't recall it.

1 K. Chow

2 Q. I'm going to ask for a blank area in the
3 transcript right now, and if you could recall,
4 if you could just insert that when you get the
5 transcript, I would appreciate it.

6 (Information later provided.)

7 Q. What happened in May 2009?

8 A. The franchise terminated my contract
9 because I wasn't producing sales for the
10 franchiser.

11 Q. Cruise Planners?

12 A. Yes.

13 Q. Did you have any other work at the same
14 time?

15 A. I was working for The Fresh Diet. I was
16 fully employed for The Fresh Diet.

17 Q. When did you start with The Fresh Diet?

18 A. Approximately November of 2008 as a
19 part-time. Then I was put on company payroll
20 as of January 23rd of 2009.

21 Q. When you said you were put on "company
22 payroll," what do you mean?

23 A. Put on full-time status.

24 Q. What was that?

25 A. Put as a -- part-time status eventually

1 K. Chow

2 Q. That's what you mean by "full-time
3 status"?

4 MR. ANDREWS: Objection.

5 A. Yes.

6 Q. When you were given your own route, how
7 many days were you working?

8 A. I would say five -- five days. And on
9 the weekend, I could switch over to do
10 Mr. Hussain's route and the other driver's
11 route on Friday nights.

12 Q. Is that six days total?

13 A. Six days total.

14 Q. What were you doing for Cruise Planners
15 from November 2008 to January 2009?

16 A. I had limited activity selling cruises
17 and devoting most of the work doing part-time
18 with Fresh Diet.

19 And even though with Fresh Diet, I have
20 another job also in there doing part-time
21 delivering papers, newspapers.

22 Q. You were doing that during the day?

23 MR. ANDREWS: Objection.

24 A. During the night as well too.

25 Q. You were selling cruises and selling

1 K. Chow

2 newspapers at the same time you were performing
3 part-time work for The Fresh Diet?

4 A. Yes.

5 MR. ANDREWS: Objection.

6 Q. From November 2008 to January 2009?

7 A. Correct.

8 MR. ANDREWS: Objection.

9 Q. Who were you delivering newspapers for?

10 A. There's a company named Mitchell's.

11 Q. What newspapers were you delivering?

12 A. New York times, Wall Street Journal,
13 Daily News, New York Post.

14 Q. When were you performing the newspaper
15 deliveries?

16 A. I would say around approximately
17 October 2008 until by around Christmas of
18 December of the same year.

19 Q. 2008?

20 A. Yes.

21 Q. Why'd you stop?

22 A. I couldn't handle two jobs at the same
23 time, so I devoted at the time to Fresh Diet.

24 Q. Were you paid hourly by Mitchell's?

25 A. Yes.

1 K. Chow

2 how long it took you to perform deliveries on
3 any given night in November 2008?

4 MR. ANDREWS: Objection.

5 A. At that time, we report to the facility
6 like 5:00 p.m., around 5:00 a.m., so
7 approximately twelve hours.

8 Q. Did those hours change during the time
9 you performed work?

10 A. Yes, depending how the kitchen was
11 producing. If they didn't produce on time, we
12 would stay a little bit longer or work a little
13 bit later.

14 Q. What would you do when you got to the
15 facility at 5:00 p.m.?

16 MR. ANDREWS: Objection.

17 A. I would wait to see if all the food was
18 packed and ready to be loaded.

19 Q. When were you done with your last
20 delivery?

21 A. Around 5:00.

22 Q. What would you do after you completed
23 your last delivery?

24 A. I would go home.

25 Q. With the bags?

1 K. Chow

2 A. Yeah, with the empty cooler
3 (indicating).

4 Q. Did you report to anyone after you were
5 done with your deliveries in November 2008?

6 A. With that, with the newspaper, it can
7 overlap too at the same time.

8 Q. Were you performing meal deliveries and
9 newspaper deliveries on the same nights in
10 November 2008?

11 A. It happens a few times.

12 Q. Did that happen until a certain time?

13 A. I went to Fresh Diet first. If I finish
14 Fresh Diet, I would report to newspaper
15 delivery.

16 Q. You had newspapers and meals in your
17 car --

18 MR. ANDREWS: Objection.

19 Q. -- for deliveries?

20 MR. ANDREWS: Objection.

21 A. Yes.

22 MR. ANDREWS: Mischaracterizes
23 his testimony.

24 Q. Did you sign any type of agreement with
25 Late Night?

1 K. Chow

2 A. Yeah, we did sign numerous agreements.

3 Q. Do you know if you ever signed an
4 independent contractor agreement?

5 MR. ANDREWS: Objection.

6 A. I did sign independent contractor
7 agreement.

8 (Whereupon, Late Night Express
9 independent contractor agreement was
10 marked as Defendant's Exhibit 24, for
11 identification, as of this date.)

12 Q. I'm now showing you what's been marked
13 for identification as Defendant's Exhibit 24,
14 and I'm going to ask if you've ever seen that
15 document before today (handing).

16 A. This is not the last contract I signed.
17 Even though it was last contract I would have
18 been signed, it would have been page being
19 modified because it include roadside
20 assistance.

21 Yeah, I signed this contract. This is
22 not the last contract I signed. If I would
23 have signed contract, it would have had
24 roadside assistance on it.

25 Q. Was there one you may have signed

1 K. Chow

2 A. Yeah. I always carry that.

3 Q. Then the following sentence in that same
4 paragraph, 12, says, "This includes roadside
5 assistance," correct?

6 A. Yes.

7 Q. Is it your understanding that this meant
8 that the company would be providing roadside
9 assistance?

10 MR. ANDREWS: Objection.

11 A. This is what they provided us
12 (indicating).

13 Q. You don't understand that to mean that
14 the contractor is to pay for his own roadside
15 assistance?

16 MR. ANDREWS: Objection.

17 A. Okay. But like I said, but why would
18 the company provide roadside assistance to the
19 drivers?

20 Q. Do you have your own car when you
21 perform deliveries for Late Night?

22 A. Yes, I use my own vehicle.

23 Q. What car was that?

24 A. 1993 Honda Accord.

25 Q. Was it the same throughout the time you

1 K. Chow

2 Q. You paid for your own insurance that
3 whole time?

4 A. Correct.

5 MR. ANDREWS: Objection.

6 Q. Did you ever ask Late Night to reimburse
7 you for that insurance?

8 A. That, I did not.

9 Q. Did you ever ask The Fresh Diet to
10 reimburse you for that insurance?

11 A. That, I did not.

12 MR. POLLACK: I want to take a
13 five-minute break.

14 (Whereupon, a recess was taken
15 at this time.)

16 (Whereupon, Class action
17 affidavit was marked as Defendant's
18 Exhibit 26, for identification, as of
19 this date.)

20 Q. I'm now showing you what's been marked
21 for identification as Defendant's Exhibit 26
22 (handing).

23 MR. ANDREWS: Is this my copy
24 (indicating)?

25 MR. POLLACK: Yes.

1 K. Chow

2 Mr. Hussain needs me to do something, I would
3 show up at 5:00 p.m.

4 Q. Where, in New Jersey?

5 A. No, at The Fresh Diet.

6 Q. Brooklyn?

7 A. Brooklyn.

8 Q. Then sometime you got a schedule to show
9 up at 8:00 p.m.?

10 A. Yes.

11 Q. Do you remember when that was?

12 A. That, I don't recall, but I was given
13 that schedule.

14 Q. 2010?

15 MR. ANDREWS: Objection.

16 A. 2010, like late 2010.

17 Q. Before late 2010, is it your testimony
18 you were showing up around 5:00 p.m.?

19 A. Yes.

20 Q. Sometime in late 2010, you got a
21 schedule to show up at 8:00 p.m.?

22 A. Yes.

23 Q. Did you arrive at work at 8:00 p.m. when
24 you got that schedule?

25 A. Yes, unless if a certain circumstances,

1 K. Chow

2 I would call Mr. Hussain or text him that I
3 would be running late.

4 Q. Were you ever penalized if you showed up
5 late?

6 A. Not as of -- not -- no. If I give him
7 an advance notice that I would be running late,
8 he would not penalize me.

9 Q. How late would you show up to work?

10 MR. ANDREWS: Objection.

11 A. I would let him know by text, maybe
12 about a half an hour to an hour late.

13 Q. So by 8:30 or 9:00 p.m.?

14 A. Yes.

15 MR. ANDREWS: Objection.

16 Q. This is from late 2010 until April 2012?

17 A. Yes.

18 And usually from that time, in between,
19 I'll be working at home too off the clock
20 making manifests for the Manhattan drivers.
21 That's as of January of 2011.

22 Q. You said you saw a document containing
23 the requests made by the defendants for support
24 of your claims in this action, is that fair to
25 say?

1 K. Chow

2 That's the schedule time that they go to.

3 Q. What about after?

4 A. After that, they gave them the sheet
5 telling them the schedule where they going to
6 report to.

7 If you're in Manhattan, you're going to
8 report a little bit later. People that doing
9 the far routes like Long Island, Connecticut,
10 and Jersey would report a little bit earlier.

11 Q. What time?

12 MR. ANDREWS: Objection.

13 A. Like 5:00, and they'll get there like
14 6:00.

15 Q. When was this?

16 A. This is like about after June of 2010.
17 That's like late of 2010 I'm talking about.

18 Q. You were reporting to the facility at
19 what time?

20 MR. ANDREWS: Objection.

21 A. At 8:00.

22 Q. At 8:00?

23 A. Yes.

24 Q. Would others arrive at 8:00?

25 MR. ANDREWS: Objection.

1 K. Chow

2 A. Like I said, it depends on the route
3 that they have. If they have a far route, they
4 would arrive a little bit earlier.

5 Q. What about later?

6 Did anyone show up later than 8:00 p.m.?

7 A. It happens.

8 Q. Do you know any individuals who showed
9 up later than 8:00 p.m.?

10 A. That, I don't really recall.

11 Q. Did you ever discuss your hours with
12 other drivers of The Fresh Diet?

13 A. Only with Mr. Hernandez, Mr. White.

14 Q. When did you have these discussions?

15 A. It varies. It varies.

16 Q. During the time you were performing --

17 A. Yeah.

18 Q. -- deliveries?

19 What would they say about their hours?

20 What would Mr. Hernandez say about his
21 hours?

22 A. His hours that he works, like
23 fourteen hours a day.

24 Q. He said that he works fourteen hours a
25 day?

1 K. Chow

2 A. Yes.

3 Q. Do you remember when he said that?

4 A. That, I don't recall.

5 Q. You were showing up to the Brooklyn
6 facility at 192 Seigel Street around 8:00 p.m.?

7 MR. ANDREWS: Objection.

8 A. Yeah, at that time.

9 Q. In June --

10 A. Later on.

11 Q. Late 2010 --

12 A. Yes.

13 Q. -- through April 2012?

14 A. Yes.

15 Q. You were showing up around 8:00 p.m.?

16 A. Yes.

17 Q. Was Mr. Hernandez ever there when you
18 showed up at 8:00 p.m.?

19 A. Yes.

20 Q. Was he always there when you showed up
21 at 8:00 p.m.?

22 A. Sometime he may call in and let
23 Mr. Hussain know if he's running late by text
24 or phone.

25 Q. Were others there when you showed up at

1 K. Chow

2 A. He would like see them or call them over
3 the phone or tell them to see them in person.

4 Q. Do you remember any specific instance
5 where that happened?

6 A. That, it happens in a meeting.

7 Q. What meeting?

8 A. The driver meeting.

9 Q. How many meetings were there?

10 A. That, I could not recall, but it were
11 numerous meetings.

12 Q. What would Mr. Hussain do during that
13 meeting if a New York City area driver did not
14 do the work they had been assigned?

15 A. The policy is that you will get a
16 warning and, like I said, disciplined up to
17 including termination.

18 Q. What do you mean by "disciplined"?

19 A. Cut your route, reduce your route.

20 Q. Did that ever happen to you?

21 A. No.

22 Q. Did that ever happen to any other driver
23 of Late Night?

24 MR. ANDREWS: Objection.

25 A. That, I do not know.

1 K. Chow

2 Q. You do not know?

3 A. (Witness shakes head.)

4 Q. Can you verbally answer the question?

5 A. No.

6 Q. Were there ever written warnings?

7 A. No written warnings.

8 Q. Do you ever recall a verbal warning?

9 A. Yes.

10 Q. By who?

11 A. Mr. Hussain.

12 Q. To who?

13 A. To me.

14 Q. What would he say?

15 A. He say the next time if you doing

16 something without my permission, I'm going to

17 cut your route.

18 Q. What would you say in response?

19 A. I say okay.

20 Q. What did you ever do without his

21 permission?

22 A. Adding stops from other drivers if they

23 need help, adding stop without letting him know

24 that they running late.

25 Q. "Adding stops from other drivers," what

1 K. Chow

2 does that mean?

3 A. Like getting extra stops from other
4 drivers from other routes.

5 Q. You would take one of their stops?

6 MR. ANDREWS: Objection.

7 A. Yes.

8 Q. You would take one of their stops?

9 A. Yes.

10 Q. How would you do that?

11 A. Oh, just meet up in person.

12 Q. You would take the meal bag from their
13 car?

14 A. Yes.

15 Q. How would you know where to deliver it?

16 A. It has it on the menu. The bags have
17 the menu.

18 Q. Who did you ever take a meal from to
19 deliver for them?

20 A. Mostly Nafis.

21 Q. Anyone else?

22 A. That's what I only know, Nafis.

23 Q. Was this when you were delivering in
24 Manhattan?

25 A. Yeah, Manhattan and New Jersey.

1 K. Chow

2 A. Yes. I got the schedule subject to
3 mandatorial changes (sic).

4 Q. You didn't perform deliveries from
5 5:00 p.m. to 7:00 a.m. from June 2010 to April
6 2012?

7 A. No. No.

8 Q. You did not, correct?

9 A. No.

10 Q. When did you perform deliveries from
11 June 2010 until April 2012?

12 A. I say 8:00 p.m.

13 Q. Until?

14 A. Until 7:00 a.m.

15 Q. Did you ever take breaks during the
16 deliveries?

17 A. Most of the time, no.

18 Q. You would drive straight from customer
19 to customer?

20 A. Yes.

21 Q. Would you eat?

22 A. I would stop by and eat.

23 Q. You would take breaks?

24 MR. ANDREWS: Objection.

25 A. Yeah.

1 K. Chow

2 MR. POLLACK: What's the basis
3 for the objection?

4 MR. ANDREWS: Mischaracterizes
5 his testimony.

6 Q. You would take breaks, correct?

7 A. Yes.

8 Q. To do what?

9 A. Go to bathroom, order some snacks.

10 Q. Would you stop at a fast food
11 restaurant?

12 A. Yes.

13 Q. Would you stop at a 711?

14 A. Yes.

15 Q. Would you stop for gas?

16 A. Yes.

17 Q. You did this between 8:00 p.m. and
18 7:00 a.m.?

19 A. Yes.

20 Q. If you ever took a break, did you report
21 to Syed that you were going to take a break?

22 A. No.

23 Q. Were you ever reimbursed for any meals
24 that you ate during the time you were
25 performing deliveries?

1 K. Chow

2 A. No reimbursement.

3 Q. No reimbursement for anything?

4 MR. ANDREWS: Objection.

5 A. No. No gas. No reimbursement for gas.
6 No reimbursement for meals. No reimbursement
7 for parking and moving violation tickets.

8 Q. What about tolls?

9 A. Tolls we do get reimbursed every two
10 weeks.

11 Q. But nothing else?

12 A. Nothing else.

13 Q. How often would you take breaks during
14 the deliveries?

15 A. It varied. Sometime one breaks, two
16 breaks.

17 Q. Did you ever take three breaks?

18 A. No.

19 Q. Did you have any repairs to your car
20 between November 2008 and April 2012?

21 A. Yes.

22 Q. You paid for those repairs yourself?

23 A. Yes.

24 Q. Did you ever seek reimbursement for
25 those repairs?

1 K. Chow

2 A. That, I do not have a document for that.

3 Q. Did you ever seek reimbursement for
4 those repairs?

5 A. No.

6 Q. Did you pay for maintenance of your car
7 between November 2008 and April 2012?

8 A. Yes.

9 Q. Were you ever reimbursed for any
10 maintenance to your car?

11 A. No.

12 Q. Did you ever do anything, any personal
13 tasks, during the time you were performing
14 deliveries?

15 A. No, just business, just deliveries.

16 Q. Did you ever go into a Stop & Shop?

17 MR. ANDREWS: Objection.

18 A. Once in a while.

19 Q. How long would you be in a Stop & Shop?

20 MR. ANDREWS: Objection.

21 A. About like five minutes.

22 Q. What would you do?

23 MR. ANDREWS: Objection.

24 A. Grab something to eat.

25 Q. Did you ever buy any other groceries

1 K. Chow

2 FD000390?

3 A. Yes.

4 Q. What about the second page marked
5 FD000405?

6 A. This is correct.

7 Q. When you say "this is correct," what do
8 you mean?

9 A. Nothing. I said this is the right
10 compensation (indicating).

11 Q. \$64,390?

12 A. Yes.

13 Q. Looking at FD000406, do you recognize
14 that document?

15 A. Yes.

16 Q. Does that reflect the right compensation
17 for 2010?

18 A. Yes.

19 Q. Did you file a tax return in 2009?

20 A. I just file recently.

21 Q. Did you file a tax return in 2009?

22 A. I file -- yes.

23 Q. Did you file a tax return in 2010?

24 A. No.

25 Q. Did you file a tax return in 2011?

1 K. Chow

2 A. No.

3 Q. Did you file a tax return in 2012?

4 A. No.

5 Q. I'm going to ask for a copy of the 2009
6 tax return that you filed.

7 You previously testified that you had
8 kept certain receipts, such as those marked on
9 Defendant's Exhibit 30, to claim on a 1040; is
10 that correct?

11 MR. ANDREWS: Objection.

12 A. Yes.

13 Q. What do you mean by that?

14 A. Any deduction, like gas, fuel, on the
15 1040.

16 Q. But you never claimed those deductions?

17 A. I claim them on 2009.

18 Q. You did not in 2010?

19 A. No.

20 Q. Or 2011?

21 A. No.

22 Q. Or 2012?

23 A. No.

24 Q. You didn't pay taxes from 2010 to 2012?

25 MR. ANDREWS: Objection.

1 K. Chow

2 A. Yes.

3 Q. You did not, correct?

4 A. I did not.

5 Q. Did you receive any type of benefits
6 from Late Night for the time you worked between
7 November 2008 until April 2012?

8 MR. ANDREWS: Objection.

9 A. What type of benefit?

10 Q. Insurance, health insurance.

11 A. Oh, nothing.

12 Q. Nothing?

13 A. (Witness shakes head.)

14 Q. Did you maintain a cell phone the entire
15 time you worked?

16 A. Yes.

17 Q. Was it the same cell phone from
18 November 2008 through April 2012?

19 A. Yeah, the same phone number.

20 Q. What about the same phone?

21 A. No, different phone.

22 Q. How many different phones?

23 A. That, I could recall. About like three
24 different phones.

25 Q. When was the last phone you received?

1 K. Chow
2 p.m.?
3 A. Yes.
4 Q. Its says, "I will be at the kitchen by
5 9:00."
6 Do you see that?
7 A. Yes.
8 Q. What does that mean?
9 A. I informed Mr. Hussain that I be running
10 late.
11 Q. And that you'll be there at what time?
12 A. By 9:00.
13 Q. 9:00 p.m.?
14 A. Yes.
15 Q. When you say you were running late, why
16 were you running late?
17 MR. ANDREWS: Objection.
18 A. It could be many factors.
19 Q. Like what?
20 A. Making manifest or running a little
21 errand.
22 Q. Were you making manifests in October of
23 2011?
24 A. That, I do not recall.
25 Q. What kind of errand may you have been

1 K. Chow

2 running that would have caused you to be late?

3 MR. ANDREWS: Objection.

4 A. Grabbing something to eat.

5 Q. Anything else?

6 A. That's all.

7 Q. That next entry, do you see that, for
8 November 14, 2011 at 6:55 p.m.?

9 A. Yes.

10 Q. That says, "I will be at the kitchen by
11 8:15 p."

12 A. Yes.

13 Q. Does that mean you will be at the
14 kitchen by 8:15 p.m.?

15 A. Yes.

16 Q. Did you receive a response to that text
17 message?

18 A. Most of these, he never responds.

19 Q. Looking at that next one,
20 November 15, 2011 at 4:43 a.m., do you see
21 that?

22 A. Yes.

23 Q. That says, "59 bags."

24 A. Yes.

25 Q. What does that mean?

1 K. Chow

2 A. That's empty bags I pick up at that
3 date.

4 Q. Were you done with deliveries at
5 4:43 a.m. on November 15, 2011?

6 MR. ANDREWS: Objection.

7 A. Yes, I finished my last stop at that
8 time.

9 Q. The next entry from November 21, 2011 at
10 10:12 a.m., do you see that entry --

11 A. Yes.

12 Q. -- that text message?

13 A. Uh-huh.

14 Q. It says, "I will be at the kitchen by
15 10:00 p.m. tonight," correct?

16 A. Yes. Yes.

17 Q. Do you know why you were going to be at
18 the kitchen at 10:00 p.m. on November 21, 2011?

19 A. I do not recall.

20 Q. Looking at the next page marked
21 FD000395, do you see the entry for
22 December 8, 2011 at 2:21 p.m.?

23 A. Yes.

24 Q. It says, "I will not be able to attend
25 the meeting tonight."

1 K. Chow

2 A. Yes. Yes.

3 Q. Were you disciplined for not attending
4 the meeting?

5 MR. ANDREWS: Objection.

6 A. Mr. Hussain knows I'm making a manifest
7 during that time.

8 Q. How does he know that?

9 A. Because he gets an e-mail.

10 Q. How did he know that you would be
11 preparing manifests on December 8, 2011?

12 A. It would be ongoing because he always
13 said okay, I have a last minute call, a job
14 call out. He tell me to go split the route up.

15 Q. The next entry is from December 9, 2011
16 at 6:38 p.m.

17 Do you see that one?

18 A. Yes.

19 Q. It says, "I will be in the kitchen by
20 9:00."

21 A. Yes.

22 Q. Is that 9:00 p.m.?

23 A. 9:00 p.m., correct.

24 Q. The next entry for December 11, 2011 at
25 7:04 p.m., do you see that entry?

1 K. Chow

2 A. Yes.

3 Q. It also says, "I will be at the kitchen
4 by 9:00."

5 A. Yes.

6 Q. Does that mean 9:00 p.m.?

7 A. Yes.

8 Q. Looking at the next one,
9 December 14, 2011, 5:46 p.m., do you see that?

10 A. Yes.

11 Q. What do you mean by "I will be at 6:15"?

12 A. I would be at the meeting.

13 Q. Looking at the next entry, which goes,
14 it looks like, from FD000395 to 000396, on
15 December 18, 2011 at 7:43 p.m., do you see the
16 text underneath that?

17 A. Yes.

18 Q. It says, "I will be at the kitchen by
19 10:00."

20 A. Yes.

21 Q. That meant 10:00 p.m.?

22 A. Correct.

23 Q. Looking at the next page, FD000397, do
24 you see the entry for January 13, 2012 at
25 7:45 p.m.?

1 K. Chow

2 A. Yes.

3 Q. It says, "I'll be at the kitchen by
4 9:00."

5 A. Yes.

6 Q. That meant 9:00 p.m.?

7 A. Yes.

8 Q. For January 20, 2012 at 8:02 p.m., do
9 you see that one?

10 A. Yes.

11 Q. "I will be at the kitchen by 9:30."

12 A. Yes.

13 Q. 9:30 p.m.?

14 A. Yes.

15 (Whereupon, Text messages were
16 marked as Defendant's Exhibit 36, for
17 identification, as of this date.)

18 Q. I'm now showing you what's been marked
19 for identification as Defendant's Exhibit 36,
20 and I'm going to ask if you've seen those
21 documents before today (handing).

22 MR. ANDREWS: You've looked at
23 it?

24 THE WITNESS: Yeah, I've looked
25 it at.

1 K. Chow

2 MR. ANDREWS: And your answer's
3 yes?

4 THE WITNESS: Yeah.

5 Q. Are these similar text messages to those
6 that were marked as Defendant's Exhibit 35?

7 MR. ANDREWS: Objection.

8 A. Different.

9 Q. Are these text messages from you?

10 A. Yes.

11 Q. Who are they to?

12 A. Mr. Hussain and Mr. Dacres.

13 Q. Looking at the March 3, 2012 entry from
14 8:31 p.m. on FD000402, do you see that entry?

15 A. Yes.

16 Q. It says, "I will be running late and
17 will be at the kitchen by midnight."

18 Do you see that?

19 A. Yeah.

20 Q. That meant you would not be at the
21 kitchen until 12:00 a.m. that night?

22 A. Correct.

23 Q. Did you receive a response to that?

24 A. No, no response.

25 Q. The following entry from April 3, 2012

1 K. Chow

2 at 8:20 p.m., do you see that entry?

3 A. Yes.

4 Q. It says, "I will be at the kitchen by
5 9:30."

6 A. Yes.

7 Q. Does that mean 9:30 p.m.?

8 A. Correct.

9 Q. Do you know what you were doing on
10 March 30th until midnight?

11 MR. ANDREWS: Objection.

12 A. That, I do not recall.

13 Q. On March 30, 2012, were you scheduled to
14 be at the facility at 8:00 p.m.?

15 A. Yes.

16 Q. On April 3, 2012, were you scheduled to
17 be at the facility by 8:00 p.m.?

18 A. Yes.

19 Q. Looking at the next page, at FD000403,
20 turning your attention to the entry for
21 April 14, 2012 at 8:44 p.m., do you see that?

22 A. Yes.

23 Q. Were you scheduled to be at the facility
24 at 8:00 p.m. that night?

25 A. Yes.

1 K. Chow

2 Q. Is that a text message from you saying
3 "I'll be at the kitchen by 10:00"?

4 A. Yes.

5 Q. That's 10:00 p.m.?

6 A. Yes.

7 Q. The following entry for April 6, 2012 at
8 7:11 p.m., do you see that entry?

9 A. Yes.

10 Q. It says, "I will be in the kitchen by
11 midnight."

12 A. Yes.

13 Q. That's a text from you to Syed?

14 A. Yes.

15 (Whereupon, Text messages were
16 marked as Defendant's Exhibit 37, for
17 identification, as of this date.)

18 Q. I'm now showing you what's been marked
19 for identification as Defendant's Exhibit 37,
20 and I'm going to ask if you've seen those
21 documents before today, which are marked
22 FD000575 through 000581 (handing).

23 A. Yes.

24 Q. What are these documents?

25 A. Text messages to Syed.

1 K. Chow

2 Q. Do you see the entry for April 20, 2012
3 at 10:06 p.m.?

4 A. Yes.

5 Q. Were you scheduled to be at the facility
6 at 8:00 p.m. that night?

7 A. Yes.

8 Q. Do you see where it says "I will be at
9 the kitchen by midnight"?

10 A. Yes.

11 Q. Going down to the entry on
12 April 21, 2012 at 5:07 a.m., do you see that?

13 A. Yes.

14 Q. It says "15 bags, 22 stops," correct?

15 A. Yes.

16 Q. What does that mean?

17 A. That's the number empty cooler bags I
18 pick up and the number of stop I did for the
19 night.

20 Q. Would the deliveries on April 20th have
21 commenced at or after midnight for your routes
22 that day?

23 MR. ANDREWS: Objection.

24 A. That, I do not know.

25 Q. It says on April 20, 2012 at 10:06 p.m.

1 K. Chow

2 that you will not be there until midnight,
3 correct?

4 A. Right.

5 Q. A route goes from one day into the next,
6 correct?

7 A. Yes.

8 Q. Your route for April 20th would have
9 ended on April 21st --

10 A. Correct.

11 Q. -- is that a fair statement?

12 A. Yes, that's a fair statement.

13 Q. At 10:06 p.m., you're texting that you
14 will not be there until midnight, correct?

15 A. Correct, yes.

16 Q. On April 21, 2012 at 5:07 a.m., it
17 indicates that you had picked up fifteen empty
18 bags and made twenty-two stops; is that
19 correct?

20 A. Yes. It's only one route. It's a very
21 light night. It's a Friday night for Saturday.

22 Q. How many hours did you work that day?

23 A. From that, I would say about five hours.

24 Q. Looking at the next entry,
25 April 23, 2012 4:26 a.m., do you see that?

1

2

I N D E X

3

4

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EXAMINATION BY

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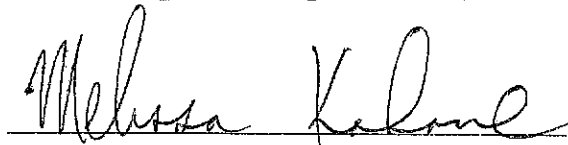
C E R T I F I C A T E

I, MELISSA KAHANE, hereby certify that the Examination Before Trial of KENNETH CHOW was held before me on the 24th day of September, 2013; that said witness was duly sworn before the commencement of his testimony; that the testimony was taken stenographically by myself and then transcribed by myself; that the party was represented by counsel as appears herein;

That the within transcript is a true record of the Examination Before Trial of said witness;

That I am not connected by blood or marriage with any of the parties; that I am not interested directly or indirectly in the outcome of this matter; that I am not in the employ of any of the counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 24th day of September, 2013.

A handwritten signature in cursive script, reading "Melissa Kahane", written over a horizontal line.

MELISSA KAHANE

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